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Attorneys for Plaintiff and the Proposed Class

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TRACY MAIER, on behalf of herself,
all others similarly situated, and the
general public,

Plaintiff,

v.

J. C. PENNEY CORPORATION, INC.,
a Delaware Corporation; J. C. PENNEY
COMPANY, INC., a Delaware
Corporation,

Defendants.

Case No.: '13CV0163 IEG DHB

CLASS ACTION

**COMPLAINT FOR DAMAGES
AND INJUNCTIVE RELIEF
PURSUANT TO THE TELEPHONE
CONSUMER PROTECTION ACT,
47 U.S.C. §§ 227 *et seq.***

DEMAND FOR JURY TRIAL

INTRODUCTION

1
2 1. Tracy Maier (“Plaintiff”) brings this Class Action Complaint for
3 damages, injunctive relief, and any other available legal or equitable remedies,
4 resulting from the illegal actions of J. C. Penney Corporation, Inc. and J. C. Penney
5 Company, Inc. (collectively, “Defendants” or “JCP”), in negligently, and/or
6 willfully contacting Plaintiff through SMS or “text” messages on Plaintiff’s
7 cellular telephone, in violation of the Telephone Consumer Protection Act, 47
8 U.S.C. § 227 et seq., (“TCPA”), thereby invading Plaintiff’s privacy. Plaintiff
9 alleges as follows upon personal knowledge as to her own acts and experiences,
10 and, as to all other matters, upon information and belief, including investigation
11 conducted by her attorneys.

JURISDICTION AND VENUE

12
13 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff
14 seeks up to \$1,500 in damages for each text message in violation of the TCPA,
15 which, when aggregated among a proposed class number in the tens of thousands,
16 exceeds the \$5,000,000 threshold for federal court jurisdiction. Further, Plaintiff
17 alleges a national class, which will result in at least one class member belonging to
18 a different state than that of Defendants, providing jurisdiction under 28 U.S.C.
19 Section 1332(d)(2)(A). Therefore, both elements of diversity jurisdiction under the
20 Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has
21 jurisdiction.

22 3. Venue is proper in the United States District Court for the Southern
23 District of California pursuant to 18 U.S.C. § 1391(b) and 1441(a) because
24 Defendants, both Delaware corporations, are, and at all times herein mentioned
25 were, doing business in the County of San Diego, State of California.

26 ///

27 ///

PARTIES

4. Plaintiff Tracy Maier is, and at all times mentioned herein was, a citizen and resident of the State of Pennsylvania. She is, and at all times mentioned herein was a “person” as defined by 47 U.S.C. § 153 (32).

5. Plaintiff is informed and believes, and thereon alleges, that Defendant J. C. Penney Corporation, Inc. is, and at all times mentioned herein was, a Delaware corporation, and a “person,” as defined by 47 U.S.C. § 153 (32).

6. On information and belief, Defendant J. C. Penney Corporation, Inc. maintains its principal place of business at 6501 Legacy Drive, Plano, Texas 75024-3698, and is registered to do business in California.

7. Plaintiff is informed and believes, and thereon alleges, that Defendant J. C. Penney Company, Inc. is, and at all times mentioned herein was, a Delaware corporation, and a “person,” as defined by 47 U.S.C. § 153 (32).

8. On information and belief, Defendant J. C. Penney Company, Inc. maintains its principal place of business at 6501 Legacy Drive, Plano, Texas 75024-3698, and is registered to do business in California.

9. Plaintiff alleges that at all times relevant herein Defendants conducted business in the state of California and in the County of San Diego, and within this judicial district.

FACTUAL ALLEGATIONS

10. One of the newest types of bulk marketing is to advertise through Short Message Services. The term “Short Message Service” or “SMS” is a messaging system that allows cellular telephone subscribers to use their cellular telephones to send and receive short text messages, usually limited to 160 characters.

11. An “SMS message” is a text message call directed to a wireless device through the use of the telephone number assigned to the device. When an SMS or

1 “text” message call is successfully made, the recipient’s cell phone rings or
2 otherwise notes the receipt of the text message, alerting him or her that a call is
3 being received. As cellular telephones are inherently mobile and are frequently
4 carried on their owner’s person, calls to cellular telephones, including SMS
5 messages, may be received by the called party virtually anywhere worldwide.

6 12. Unlike more conventional advertisements, such text messages actually
7 costs their recipients money, because cell phone users must frequently pay their
8 wireless service providers either for each text message call they receive or incur a
9 usage allocation deduction to their text plan, regardless of whether or not the
10 message is authorized.

11 13. Over the course of an extended period beginning no later than in
12 2012, Defendants and their agents directed the mass transmission of text messages
13 to the cell phones nationwide of what they hoped were customers or potential
14 customers of JCP.

15 14. On June 16, 2012, Plaintiff Tracy Maier received an unsolicited SMS
16 or “text” message to her wireless phone, for which Plaintiff provided no consent to
17 receive the text messages, in an effort to promote Defendants’ retail store, J. C.
18 Penney.

19 15. Specifically, on June 16, 2012, Plaintiff Tracy Maier received the
20 following text message from 527-365:

21 jcp: Reply YES now to be
22 first to know about our
23 best prices, special store
24 events & new things
25 happening at jcp. Dtls
26 <http://bit.ly/yALZuq>
27 Msg&DataRatesApply
28

16. This unsolicited text message placed to Plaintiff's cellular telephone was placed via an "automatic telephone dialing system," ("ATDS") as defined by 47 U.S.C. § 227 (a)(1), is prohibited by 47 U.S.C. § 227 (b)(1)(A), which had the capacity to store or produce and dial numbers randomly or sequentially, to place telephone calls and/or SMS or text messages to Plaintiff's cellular telephone.

17. The telephone numbers that Defendants, or their agents, called and/or sent the text messages to were assigned to cellular telephone services for which Plaintiff incurred a charge for incoming calls or text messages pursuant to 47 U.S.C. § 227(b)(1).

18. These telephone text messages constituted “calls” under the TCPA that were not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

19. Plaintiff did not provide Defendants or their agents prior express consent to receive unsolicited text messages pursuant to 47 U.S.C. § 227 (b)(1)(A).

20. These telephone confirmatory text messages by Defendants or their agents violated 47 U.S.C. § 227(b)(1).

21. These text messages were telephone “calls” under the TCPA that were not for emergency purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

22. These text messages by Defendants or their agents therefore violated 47 U.S.C. § 227(b)(1).

CLASS ACTION ALLEGATIONS

23. Plaintiff brings this action on behalf of herself and on behalf of all others similarly situated (“the Class”).

24. Plaintiff represents, and are members of the Class, consisting of all persons within the United States who received any unsolicited SMS or text messages from Defendants or their agents on their paging service, cellular phone service, mobile radio service, radio common carrier service, or other service for which they were charged for the SMS or text messages, through the use of any

1 automatic telephone dialing system as set forth in 47 U.S.C. Section
2 227(B)(1)(A)(3) or artificial or prerecorded voice, which SMS or text messages by
3 Defendants or their agents were not made for emergency purposes or with the
4 recipients' prior express consent, within the four years prior to the filing of this
5 Complaint.

6 25. Defendants and their employees or agents are excluded from the
7 Class. Plaintiff does not know the number of members in the Class, but believe the
8 Class members number in the hundreds of thousands, if not more. Thus, this
9 matter should be certified as a Class action to assist in the expeditious litigation of
10 this matter.

11 26. Plaintiff and members of the Class were harmed by the acts of
12 Defendants in at least the following ways: Defendants, either directly or through
13 their agents, illegally contacted Plaintiff and the Class members via their cellular
14 telephones by using unsolicited SMS or text messages, thereby causing Plaintiff
15 and the Class members to incur certain cellular telephone charges or reduce
16 cellular telephone time for which Plaintiff and the Class members previously paid,
17 and invading the privacy of said Plaintiff and the Class members. Plaintiff and the
18 Class members were damaged thereby.

19 27. This suit seeks only damages and injunctive relief for recovery of
20 economic injury on behalf of the Class and it expressly is not intended to request
21 any recovery for personal injury and claims related thereto. Plaintiff reserves the
22 right to expand the Class definition to seek recovery on behalf of additional
23 persons as warranted as facts are learned in further investigation and discovery.

24 28. The joinder of the Class members is impractical and the disposition of
25 their claims in the Class action will provide substantial benefits both to the parties
26 and to the court. The Class can be identified through Defendants' records or
27 Defendants' agents' records.

1 29. There is a well-defined community of interest in the questions of law
2 and fact involved affecting the parties to be represented. The questions of law and
3 fact to the Class predominate over questions which may affect individual Class
4 members, including the following:

- 5 a. Whether, within the four years prior to the filing of this Complaint,
6 Defendants or their agents placed cellular telephone SMS or text
7 messages without the recipients' prior express consent (other than
8 SMS or text messages made for emergency purposes or made with
9 the prior express consent of the called party) to a Class member
10 using any automatic telephone dialing to any telephone number
11 assigned to a cellular telephone service;
- 12 b. Whether Plaintiff and the Class members were damaged thereby,
13 and the extent of damages for such violation; and
- 14 c. Whether Defendants and their agents should be enjoined from
15 engaging in such conduct in the future.

16 30. As a person who received at least one unsolicited telephone SMS or
17 text message without Plaintiff's prior express consent, Plaintiff is asserting claims
18 that are typical of the Class. Plaintiff will fairly and adequately represent and
19 protect the interests of the Class in that Plaintiff has no interests antagonistic to any
20 member of the Class.

21 31. Plaintiff and the members of the Class have all suffered irreparable
22 harm as a result of the Defendants' unlawful and wrongful conduct. Absent a class
23 action, the Class will continue to face the potential for irreparable harm. In
24 addition, these violations of law will be allowed to proceed without remedy and
25 Defendants will likely continue such illegal conduct. Because of the size of the
26 individual Class member's claims, few, if any, Class members could afford to
27 individually seek legal redress for the wrongs complained of herein.

32. Plaintiff has retained counsel experienced in handling class action claims and claims involving violations of the Telephone Consumer Protection Act. A class action is a superior method for the fair and efficient adjudication of this controversy. Class-wide damages are essential to induce Defendants to comply with federal law. The interest of Class members in individually controlling the prosecution of separate claims against Defendants is small because the maximum statutory damages in an individual action for violation of privacy are minimal. Management of these claims is likely to present significantly fewer difficulties than those presented in many class claims.

33. Defendants have acted on grounds generally applicable to the Class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the Class as a whole.

FIRST CAUSE OF ACTION

NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT 47 U.S.C. § 227 ET SEQ.

34. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

35. Each such text message call was made using equipment that, upon information and belief, had the capacity to store or produce telephone numbers to be called, using a random or sequential number generator. By using such equipment, Defendants were able to effectively send thousands of text messages simultaneously to lists of thousands of wireless phone numbers of consumers without human intervention. These text messages were made en masse through the use of a short code and without the prior express consent of the Plaintiff and the other members of the Class to receive such text messages.

36. The foregoing acts and omissions of Defendants and their agents constitute numerous and multiple negligent violations of the TCPA, including but

1 not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227
2 et seq.

3 37. As a result of Defendants', and Defendants' agents', negligent
4 violations of 47 U.S.C. § 227 et seq., Plaintiff and the Class are entitled to an
5 award of \$500.00 in statutory damages, for each and every violation, pursuant to
6 47 U.S.C. § 227(b)(3)(B).

7 38. Plaintiff and the Class are also entitled to and seek injunctive relief
8 prohibiting such conduct in the future.

9 **SECOND CAUSE OF ACTION**
10 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE**
11 **TELEPHONE CONSUMER PROTECTION ACT**
12 **47 U.S.C. § 227 ET SEQ.**

13 39. Plaintiff incorporates by reference the above paragraphs 1 through 33
14 inclusive, of this Complaint as though fully stated herein.

15 40. Each such text message call was made using equipment that, upon
16 information and belief, had the capacity to store or produce telephone numbers to
17 be called, using a random or sequential number generator. By using such
18 equipment, Defendants were able to effectively send thousands of text messages
19 simultaneously to lists of thousands of wireless phone numbers of consumers
20 without human intervention. These text messages were made en masse through the
21 use of a short code and without the prior express consent of the Plaintiff and the
22 other members of the Class to receive such text messages.

23 41. The foregoing acts and omissions of Defendants constitute numerous
24 and multiple knowing and/or willful violations of the TCPA, including but not
25 limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 et
26 seq.

42. As a result of Defendants' knowing and/or willful violations of 47 U.S.C. § 227 et seq., Plaintiff and the Class are entitled to treble damages, as provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

43. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and the Class members the following relief against Defendants:

**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

44. As a result of Defendant's, and Defendants' agents', negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class member \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

45. Pursuant to 47 U.S.C. § 227(b)(3)(A), Plaintiff seeks injunctive relief prohibiting such conduct in the future.

46. Any other relief the Court may deem just and proper.

**SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL
VIOLATION OF THE TCPA, 47 U.S.C. § 227 ET SEQ.**

47. As a result of Defendants', and Defendants' agents' willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class member treble damages, as provided by statute, up to \$1,500.00 for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

48. Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.

49. Any other relief the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: January 18, 2013

/s/ Ronald A. Marron

By: Ronald A. Marron

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*Attorneys for Plaintiff and the Proposed
Class*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

TRACY MAIER, on behalf of herself and all others similarly situated

(b) County of Residence of First Listed Plaintiff DELAWARE

(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Law Offices of Ronald A. Marron, APLC
3636 Fourth Ave., Suite 202, San Diego, CA 92103
(619) 696-9006

DEFENDANTS

J. C. Penney Corporation, Inc., a Delaware corporation; J. C. Penney Company, Inc., a Delaware corporation

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE:

IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

'13CV0163 IEG DHB**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

47 U.S.C. Section 227 - Telephone Consumer Protection Act ; 5 : 522

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

01/18/2013

/s/Ronald A. Marron

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____